Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1957

No. 903

MOE WEISE and JAMES LESTER FRENCH,

Petitioners,

vs.

UNITED STATES OF AMERICA.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on February 5, 1958.

Opinions Below.

The opinion of the Court of Appeals is not yet reported, and is appended hereto as Appendix "A". No written opinion was rendered by the District Court.[1]

[1]The oral ruling of the trial judge at the conclusion of this criminal case, tried without a jury, is contained in pages 136-145 of the Transcript of Record printed for use of the court below and included in the certified transcript of record filed with this Court. Nine additional copies of the aforesaid Transcript of Record have also been filed with this Court.

Jurisdiction.

The judgment of the Court of Appeals was entered February 5, 1958, and is appended hereto as Appendix "B". A timely petition for rehearing was denied on March 11, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented.

1. Whether the search and seizure herein, made incidental to an alleged lawful arrest, without search warrant, violated the provisions of the Fourth Amendment and the self-incrimination and due process provisions of the Fifth Amendment.

2. Whether, consistent with the provisions of the Fourth Amendment and the due process provisions of the Fifth Amendment, probable cause existed for the arrest, search and seizure herein, made without search warrant, when predicated solely on anonymous, unverified and hearsay reports transmitted in telephone conversations between law enforcement agents, none of whom had any personal knowledge that petitioners had committed or were committing the charged offense.

3. Whether the warrant of arrest and the complaint in support thereof, upon which the arrest, search and seizure were purportedly based in part, violated the applicable provisions of Rules 3 and 4 of the Federal Rules of Criminal Procedure when the complaint failed to set forth any essential facts constituting the offense charged or any probable cause to believe that the petitioners had committed the charged offense, and was sworn to by an officer whom the record showed had no personal knowledge that petitioners had committed the alleged offense

and who acted solely on the basis of anonymous, unverified and hearsay reports not revealed in the complaint.

4. Whether the search and seizure herein made without search warrant violated the provisions of the Fourth Amendment and the self-incrimination and due process provisions of the Fifth Amendment when the record showed that there was sufficient time and that it was practical for the officers to obtain a search warrant from a United States Commissioner pursuant to the Federal Rules of Criminal Procedure before making such search and seizure.

Constitutional Provisions and Statutes Involved.

The pertinent constitutional provisions, statutes and rules involved are appended hereto as Appendix "C".

Statement of the Case.

1. The petitioners were convicted under an indictment charging them with knowingly transporting in interstate commerce from Portland, Oregon, to Tacoma, Washington, certain obscene books, pictures and films, all in violation of 18 U. S. C. 1465 [R. 3-4].[2] The case was tried, by stipulation, before the District Court without a jury [R. 7-8, 25-27]. Upon the finding of guilt [R. 143], the petitioner Weise was sentenced to imprisonment for a period of four years, and fined the sum of $5,000.00; the petitioner French was sentenced to imprisonment for a period of two years, and fined the sum of $2,500.00 [R. 157-158]. Judgments of conviction were entered accordingly [R. 8-12].

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[2]The reference "R." is to the Transcript of Record printed for the use of the court below.

During the trial, there was admitted into evidence over petitioners' objections the various books, pictures and films which served as the basis for their conviction [R. 129-130]. Prior to the trial the petitioners moved to suppress such evidence [R. 5-7], and at the inception of the trial [R. 28-33] and throughout the trial [R. 61, 74-75, 129, 134-136], objected to the admission of the testimony upon the grounds that the arrest of petitioners and the search and seizure incidental to the arrest, were all made in violation of the Fourth and Fifth Amendments and contrary to law. The aforesaid motions and objections were all denied and overruled. The validity of the aforesaid arrest, and search and seizure incidental thereto, is the sole issue here, and the facts material to the consideration of that issue is herewith presented.

2. On March 17, 1956, petitioners were traveling in an ordinary manner in a motor vehicle in the City of Tacoma in the State of Washington [R. 69], when they were suddenly forced to the curb [R. 48] by another car bearing agents of the Federal Bureau of Investigation. Petitioners were in fact surrounded by six F.B.I. Agents, occupying different cars [R. 71], all of whom were engaged in a concerted action to arrest petitioners [R. 73]. The time was after 10 o'clock in the evening [R. 66, 68].

None of the agents had search warrants or warrants of arrest. Petitioner Weise inquired, "Well, what is this all about? What is the reason for this?" [R. 49]. He was told by the agents that "they were being arrested on charges of transporting obscene matter interstate" [R. 49]. In the rear of the car, back of the front seat [R. 67], there were numerous cardboard boxes [R. 68], all tied with heavy twine, string or cord [R. 89, 126]. Upon notifying the petitioners that they were under arrest, the

agent in charge told petitioners that he was going to take the material from the car to the office of the F.B.I., that the car could be left where it was and probably be impounded, or could be stored in a garage where F.B.I. cars are usually kept [R. 84]. Petitioner Weise chose the latter alternative [R. 84]. Thereafter, the arrested petitioners and the boxes were taken by the agents to the F.B.I. office, the boxes opened up, their contents examined and listed, and subsequently used in the criminal trial of petitioners here as aforesaid [R. 118-128].

3. The attempted justification for the aforesaid arrest, search and seizure turns principally on the testimony of one witness, Frank Willard Ralston, then Senior Resident F.B.I. Agent at Tacoma [R. 63]. For this reason, we treat first the testimony of the other agents who testified at the trial, whose actions in these proceedings were only of a subordinate character and whose knowledge of the events prior to the arrest, search and seizure were of no material significance.

F.B.I. Agent Sloat [R. 33-43] followed petitioners' car in the afternoon and evening of March 17, 1956 in Portland, Oregon. He saw petitioners bring some boxes tied in string into two different shops [R. 35-37]. He then followed them across the Vancouver Bridge into Washington [R. 37], and returned to Portland [R. 39].

F.B.I. Agent Mitchelson was stationed in Vancouver, Washington, on March 17, 1956 [R. 44]. At about 8:30 in the evening, he began following petitioners' car from the aforesaid bridge to Tacoma, Washington [R. 45]. He saw the car stop for some gas [R. 45] and nothing else. Then followed radio instructions to stop the car and make the arrest [R. 48-50].

F.B.I. Agent Buchman was also stationed at Vancouver, Washington, on March 17, 1956 [R. 51]. He began following petitioners at a point near Olympia, Washington [R. 53]. The only thing he noticed thereafter was that somewhere in the vicinity of Fort Lewis, the car stopped and petitioner French took over the driving [R. 54]. The agent followed the car to Tacoma, where the "car was stopped and the occupants placed under arrest" [R. 55, 60].

F.B.I. Agent Silvey was also stationed at Tacoma, Washington, on March 17, 1956 [R. 110]. He followed the car in Tacoma and participated in the arrest [R. 111-113].

F.B.I. Agent Cummings was stationed at Tacoma, Washington, and he participated in the arrest [R. 118-119].

These were all the witnesses, except for the witness Ralston, who testified at the trial with respect to the events prior to the arrest, search and seizure herein.

4. Ralston, the Senior Resident Agent at Tacoma [R. 63], contacted the various agents at about 2:30 p.m. on March 17, 1956 to prepare to meet and follow petitioners' car [R. 64]. Nothing was done further by Ralston until 8:30 p.m. [R. 65], at which time Ralston gave further instructions to the other agents [R. 65]. At about 10 p.m. Ralston began following petitioners' car near Olympia [R. 66-67]. He saw "boxes, cardboard boxes of a brown or craft-type paper" [R. 68], in the area back of the front seat of the car [R. 67]. He followed the car into Tacoma and finally ordered the arrests to be made there [R. 71]. All the agents who participated in the arrests were acting under Ralston's orders [R. 73].

At this point in the testimony of the witness, the prosecutor stated as follows:

> "Now, the plaintiff, your Honor, would like to offer testimony at this point for the sole purpose of establishing probable cause as entirely apart from any warrant of arrest, and with the statement to the Court that I am offering it for that sole purpose" [R. 73].

Ralston then testified that he had never seen the petitioners prior to March 17, 1956 [R. 82]. All that he learned about petitioners was from a telephone conversation with two F.B.I. agents in Seattle [R. 82] about 2 p.m. on March 17, 1956 [R. 76]. He was told in this phone conversation that petitioner Weise was a "dealer in photographs of an obscene nature"; that the said petitioner "had told someone" that he was making a trip in his car loaded with the "real stuff"; that the car had been under surveillance in various cities in California and that "packages" had been taken into "different business establishments" which were "reputed to be purveyors of obscene photographs and literature"; that the said petioner had "sold obscene photographs in Seattle a few months before," but "there was no proof of interstate transportation" [R. 76-77]. Ralston stated that when he began following petitioners' car, he not only saw the boxes in the car, but he also saw that the body of the car was "down low on the rear axle" like some cars are when they have a "heavy load in it" [R. 78]. These latter two observations, the prosecution stressed, the "witness knew of his own knowledge" [R. 78].

Ralston stated that at about 10 o'clock that same evening he received information "that a complaint had been filed and a warrant had been issued for the arrest of

Moe Weise and John Doe" [R. 78].[3] Based on the aforesaid, Ralston ordered the arrest of petitioners [R. 78]. Ralston stated that if he hadn't learned about the warrant of arrest, he didn't know whether or not he would have made the arrest [R. 79]. Ralston thought he would have waited longer "to ascertain if he made any deliveries of material either in Tacoma or other places in Washington" [R. 80]. The reason for Ralston's reluctance appears plain. The charge here was interstate transportation between Oregon and Washington [R. 3-4]. Only one agent had seen petitioners deliver some boxes to two shops in Oregon, and this officer did not even purport to testify that the shops were "reputedly" purchasers of "obscene" material [R. 35-37]. There were no visits to any shops in Washington.

5. The trial judge upheld the arrest, search and seizure [R. 139-143]. The court held first, that Ralston was entitled to rely solely on the hearsay testimony he had received, holding that this question was foreclosed by this Court's decision in *Costello v. United States*, 350 U. S. 359 [R. 142]. The court held, secondly, that such hearsay testimony gave Ralston "probable cause for believing that defendants were guilty of this offense with which they are charged here" [R. 142].

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[3]The prosecution did not offer or introduce the warrant of arrest or complaint into evidence, nor did it call to the stand Agent Heiner who swore to the complaint. After the prosecution rested, the petitioners renewed their motion to suppress [R. 134] and offered the arrest warrant and complaint into evidence to demonstrate their invalidity [Deft. Exs. A, B, R. 135; R. 19-22]. Neither the trial judge [R. 141], nor the court below (App. A), placed reliance on the warrant to justify the arrest, search and seizure. The prosecutor also agreed that the language of the complaint "might have been expanded" [R. 136]. It was for this reason, apparently, that the sole evidence offered at the trial was to establish "probable cause as entirely apart from any warrant of arrest" [R. 73].

6. The Court of Appeals affirmed (App. A). The court held that while the seizures had been made without a search warrant, still they could be justified as incidental to a lawful arrest. The court held that Ralston "himself" did not have to have probable cause to believe that an offense was being committed; and that on the issue of probable cause the case was governed by the decision of this Court in *Brinegar v. United States,* 338 U. S. 160.[4]

Reasons for Granting the Writ.

Prefatory Statement.

The courts below have decided an important question of federal law which has not been, but should be, settled by this court. Whether the considerations which led this court to decide that the return of a grand jury indictment may be based solely on hearsay evidence (*Costello v. United States,* 350 U. S. 359) apply equally to an arrest, search and seizure under the Fourth and Fifth Amendments is an important question affecting the privacy of citizens which this court should decide. Clearly this Court has never decided that an arrest, and a search

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[4]Some of the "facts" relied upon in the court below do not appear in the printed Transcript of Record. Ralston did not testify at the trial that petitioner Weise "was known to the agents of the Federal Bureau of Investigation as a dealer in pornographic material and of having a record of convictions as such" (App. A, p. 1), nor did Ralston testify that petitioner Weise had "told an agency informer that he had pornographic material for sale" (App. A, p. 1). The complaint in support of the warrant of arrest [Deft. Ex. A, R. 19-20] contained no such facts, nor indeed any evidentiary facts. If there were any facts which were not communicated to the arresting officer, or which were not revealed to the trial judge so far as shown by the printed Transcript of Record, and which therefore could not be met by petitioners in the District Court or Court of Appeals, the validity of the arrest, search and seizure could not thus be upheld under the Fourth Amendment or the due process provisions of the Fifth Amendment.

and seizure incidental to such arrest, may be based solely on hearsay testimony stemming from the unverified report of an unknown informant and the so-called reputation of the accused.

The court below has decided an important federal question in a way in conflict with applicable decisions of this Court. Nothing in the decisions of this Court, particularly in *Brinegar v. United States*, 338 U. S. 160, or its predecessor, *Carroll v. United States*, 267 U. S. 132, suggests a purpose to lower the evidentiary standards governing the conduct of law enforcement agencies in making arrests, searches and seizures in the light of the inhibitions of the Fourth and Fifth Amendments to the Constitution. This Court's decisions have constantly admonished that if the privacy of one's person and property are to be protected officials must act only upon facts and circumstances within their knowledge and upon which they have trustworthy information sufficient in themselves to justify a cautious and reasonable man in the belief that the offense charged has been or is being committed. Citizens cannot be safeguarded from unreasonable interferences with their privacy or from unfounded charges of crime if officials act only upon suspicion, conjecture or surmisal. If suspicion can be equated with probable cause, and dispassionate investigation of alleged offenses eliminated, the "knock on the door" may become an agonizing reality. In holding that the decision in *Brinegar* governed the case herein, the court below opened the door for inroads into the Constitution which this Court should prevent. (*Boyd v. United States*, 116 U. S. 616, 635.)

The Court of Appeals below has rendered a decision in conflict with the decision of other courts of

appeal on the same matter. The weight of authority supports the view that hearsay evidence alone, of the character and quality offered in the case herein, is insufficient to support a conclusion of "probable cause" upon which arrest, search and seizure may be predicated. The record does not show that the officer had any cause, probable or otherwise, to believe that petitioners were committing or had committed the crime charged in the indictment herein. Most courts have rightfully refused to hold that an "anonymous tip" or general "reputation" is enough to warrant the seizure of persons, their papers or effects. The court below, by its ruling, undermined the very basis of due process of law and the essential principles of the Fourth Amendment.

The court below has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. The complaint upon which the warrant of arrest was based, made by an officer who had no personal knowledge of the statutory conclusions to which he swore, and which even failed to set forth the essential ingredients of the offense, was in palpable violation of the applicable provisions of the Federal Rules of Criminal Procedure. Since the warrant of arrest which the officer purportedly relied on in part proved to be invalid, the prosecution at the trial sought to support the arrest, and the incidental search and seizure, by some vague hearsay statements, thrice removed, which were plainly insufficient to support a finding of probable cause. When this proved inadequate, the prosecutor urged that the officer had personally observed "brown cardboard boxes" in the "loaded" car.

While freedom from unlawful arrest, search and seizure is available alike to the guilty as well as to the innocent, it is not unimportant on the question of probable cause to examine the nature of the offense allegedly committed. Ralston was not testifying about his suspicions concerning "brown boxes" under a charge of interstate transportation of intoxicating liquors, narcotics, firearms or lottery tickets. Without any reasonable grounds for his belief, he made an arrest for unlawful interstate transportation of "obscene" materials. But "sex and obscenity are not synonymous," and material is "obscene" only when it deals "with sex in a manner appealing to prurient interest." (*Roth v. United States*, 354 U. S. 476, 487.) It is, therefore, "vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest." (*Id.*, at p. 488.) On the record here, the officer who made the arrest, search and seizure acted neither as a reasonable man nor as a cautious man. The condonation of such conduct by the courts below was inconsistent with the principles of an ordered society and the true administration of criminal justice in the federal courts.

1. The case has been treated below primarily as if it were one involving a search and seizure incidental to a lawful arrest made without warrant. We treat this issue first. We then discuss the invalidity of the warrant of arrest, and the impropriety of justifying the search and seizure herein as if it were incidental to an arrest under a lawful warrant. Finally, we touch upon the invalidity of the search and seizure if it is attempted now to justify the same without recourse to a prior valid arrest.

The history and function of the Fourth Amendment, and the related provisions of the Fifth Amendment, have received profound analysis by this Court and need no further elucidation here. (See *Boyd v. United States*, 116 U. S. 616, 624-635; the dissenting opinions of Mr. Justice Frankfurter in *Harris v. United States*, 331 U. S. 145, 157-163, and *United States v. Rabinowitz*, 339 U. S. 56, 69-86.) "But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment." (*United States v. Di Re*, 332 U. S. 581, 595.)

The search and seizure here was without a search warrant. It follows, in the light of the constitutional requirements, that the burden of proof was on the prosecution to establish the validity of the arrest, and the search and seizure incidental thereto. (*United States v. Jeffers*, 342 U. S. 48, 51; *McDonald v. United States*, 335 U. S. 451, 454.) Conversely, and for similar reasons, neither the arrest, search nor seizure can be justified by what was ultimately turned up. (*Johnson v. United States*, 333 U. S. 10, 16; *United States v. Di Re*, 332 U. S. 581, 595.)[5] Moreover, the findings by lower courts of "probable cause" cannot prevent this Court's review on whether the findings comport with the constitutional

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[5]The court below noted that the boxes seized "were found to contain some 60,000 photographs and various other pornographic material" (App. A, p. 2). While this finding is irrelevant to the issue here, it should be noted that the trial judge was actually of the view that some of the evidence seized was "hardly of a character to be deemed obscene by the standards of this day and age" [R. 137], and on appeal the Government conceded that some 80% of the photographs were not necessarily within the statutory proscription (Br. of Appellee in Court of Appeals, p. 5).

requirements. "The question is not whether he [the officer] thought the facts to constitute probable cause, but whether the courts think they did. Holmes on the Common Law, 140. Probable cause is a mixed question of law and fact." (*Director General v. Kastenbaum*, 263 U. S. 22, 28.)

The issue is whether Agent Ralston had reasonable cause for believing that petitioners on March 17, 1956 had committed, or were committing, the offense proscribed by 18 U. S. C. 1465.[6] The essential ingredients of that offense are (1) knowledge, (2) transportation in interstate or foreign commerce, (3) intent to sell or distribute, and (4) "obscene" books, pamphlets, pictures, etc.

Ralston had no personal knowledge that the petitioners had committed any one of these elements of the crime. He had never seen petitioners before that day. All he saw through his own sensory organs was a motor vehicle travelling in an ordinary manner in the City of Tacoma loaded in the rear with brown cardboard boxes tied with twine and string. It needs little argument to establish that such facts did not warrant any arrest, or search and seizure. (See, *Wrightson v. United States*, 222 F. 2d 556 (C. A. D. C., 1955); *United States v. Sipes*, 132 Fed. Supp. 537 (D. C. Tenn., 1955).)

The officer is therefore compelled to rely on the telephone message he received from his co-agent. But plainly a telephone message cannot *per se* validate an unlawful arrest, search and seizure. The summary assertions made in a brief phone call by a co-agent could not confer upon

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[6]The statute had only been enacted about a year before. 69 Stat. 183.

the arresting officer any greater authority than the co-agent himself would have if he were making the arrest. The short of the matter is that these initial hearsay conclusions upon which the officer relied in the phone conversation must themselves be tested for their adequacy, before the arrest, search and seizure here can be upheld. (*Nathanson v. United States*, 290 U. S. 41.)

The question then comes down to what the two agents who spoke to Ralston on the telephone [R. 75] personally knew relative to the alleged commission of the charged offense by these petitioners. *These two agents were not called as witnesses by the prosecution.* They were not shown to be unavailable, and it must be assured that their testimony would not have been helpful to the prosecution in establishing probable cause for the arrest, search and seizure here. (*United States v. Di Re*, 332 U. S. 581, 593.)

All that Ralston knew, therefore, was the hearsay untested conclusions of his co-agents who themselves were without any personal knowledge, so far as this record reveals. The business establishments in California to which the petitioners delivered "packages" [R. 76] bore a "reputation," according to the co-agents, of being purveyors of "obscene photographs and literature" [R. 76] and petitioner Weise had "told someone" in Los Angeles that he was making a trip with the "real stuff" [R. 76]. There was no evidence to show who that "someone" was or his reliability or indeed, his existence, if any. No evidence was introduced to show how the co-agents concluded that petitioner Weise was a "dealer in photographs of an obscene nature"; no evidence was produced to show how the "reputation" of the different business establishments was known. Nor is it insignificant that despite

the alleged surveillance of petitioners from March 15 to March 17 [R. 76], the co-agents were unable to report a single instance in which an investigation had been made of a single establishment to determine whether a "package" had been delivered by petitioners, or whether the package contained "obscene" materials [R. 76].

No argument can now be made, if such argument be valid, that the co-agents could not be expected in a brief telephone conversation to give Ralston all the facts. At the time of the trial herein, there was every opportunity to present any evidence, if they had any. The co-agents did not appear.

There is no decision of this Court or of any of the lower courts which supports an arrest, search and seizure upon the basis of the evidence appearing in this record. It has been uniformly held that private rights cannot be lost under the Constitution on the basis of information derived from an anonymous, undisclosed and unverified source, especially when such information is as vague and weak as it was in the case herein. (*Johnson v. United States*, 333 U. S. 10, 16; *Contee v. United States*, 215 F. 2d 324, 327 (C. A. D. C., 1954); *Brown v. United States*, 4 F. 2d 246, 247 (C. A. 9, 1925); *United States v. Kind*, 87 F. 2d 315, 316 (C. A. 2, 1937); *United States v. Lee*, 83 F. 2d 195, 196 (C. A. 2, 1936); *Salata v. United States*, 286 Fed. 125, 126 (C. A. 6, 1923).[7] See also, *Roviaro v. United States*, 353 U. S. 53.)

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[7]The District Courts have also suppressed evidence based on such testimony. See, *United States v. Castle*, 138 Fed. Supp. 436, 439 (D. C. D. C., 1955); *United States v. Clark*, 29 Fed. Supp. 138, 140 (D. C. Mo., 1939); *United States v. Keown*, 19 Fed. Supp. 639, 645 (D. C. Ky., 1937); *Reeve v. Howes*, 33 Fed. Supp. 619, 622 (D. C. Pa., 1940).

Nor does it aid the prosecution's case for the arresting officer to have heard from his co-agents over the telephone that the accused once "sold" obscene photographs, or that the business establishments which were visited by petitioners, seemingly in an ordinary and law-abiding manner, were "reputedly" purveyors of obscene literature. Without any evidence in the record to support these conclusions, without any showing of how these conclusions were reached, such hearsay testimony was only the equivalent of gossip, rumor and suspicion upon which no conclusion of probable cause could be based. (See *Johnson v. United States*, 333 U. S. 10; *McDonald v. United States*, 335 U. S. 451; *Wrightson v. United States*, 222 F. 2d 556 (C. A. D. C., 1955); *Pearson v. United States*, 150 F. 2d 219 (C. A. 10, 1945); *United States v. Turner*, 126 Fed. Supp. 349 (D. C. Md., 1954).)

It is submitted, therefore, that the arrest, search and seizure here was made without probable cause in violation of the constitutional provisions, and that it was error to admit the material seized into evidence over petitioner's objections. The ruling of the District Court that the case here was comparable to the case decided by this Court in *Costello v. United States*, 350 U. S. 359, appears baseless. The historic antecedents of the grand jury system are quite distinct from those of the Fourth and Fifth Amendments. Moreover, even if an indictment is returned based wholly on hearsay, the accused is always entitled to a jury trial thereafter where his guilt must be established beyond a reasonable doubt by competent evidence. On the other hand, once an arrest, search and seizure are upheld on a finding of probable cause, the rights of the accused are lost forever. By ancient usage the deliberations of a grand jury are secret

and inviolate; while the issue of probable cause is a judicial question to be decided in the open upon a careful scrutiny of the facts supporting the conclusion. Thus, the hearsay evidence which may support an indictment will be far from supporting a finding of probable cause.

The decisions relied on by the court below do not support its judgment. Each of the cases was based on the personal knowledge of the arresting officers. In *Marron v. United States*, 275 U. S. 192, whatever may be its present vitality, the speakeasy was a "common nuisance" and the crime actually was being committed in the officers' presence. In *Brinegar v. United States*, 338 U. S. 160, this Court stressed that the arresting officer had acted on facts derived from his personal observation "without the hearsay concerning general reputation" (p. 172). The officer, who had personally arrested the accused a few months before for illegally transporting liquor, had personally seen him load liquor into a truck, and himself knew that the accused hauled liquor from a "wet" state to a "dry" state (p. 162). There were also admissions of guilt before the arrest (p. 163). In *United States v. Li Fat Tong*, 152 F. 2d 650, in addition to the information received, the accused dropped a bottle of opium in the presence of the officers before his arrest (p. 651). In *Roviaro v. United States*, 353 U. S. 53, this Court described the *Li Fat Tong* decision as one where there "was sufficient evidence" apart from the confidential communications of an informant (p. 61 and fn. 11). In *United States v. Bianco*, 189 F. 2d 716 (C. A. 3, 1951), the investigating officers who testified at the trial, did not rely on "hearsay alone," but on their own personal observations which were revealed to the trial judge (pp. 719-720).

2. As noted heretofore, Ralston stated at the trial that he relied in part upon the phone information received from agent Heiner that the latter had obtained a warrant of arrest. The warrant of arrest, and the complaint upon which it was based, however, was not put into evidence by the prosecution and agent Heiner was not called as a witness. The courts below placed no particular reliance on the warrant. The complaint and warrant were palpably invalid.

This Court in *Mallory v. United States*, 354 U. S. 449, 453, described the Federal Rules of Criminal Procedure as "the procedure devised by Congress for safeguarding individual rights without hampering effective and intelligent law enforcement". Referring to Rule 4 of the said rules, this Court stated (p. 454): "The scheme for initiating a federal prosecution is plainly defined. The police may not arrest upon mere suspicion but only on "probable cause".

Rule 3 of the Federal Rules of Criminal Procedure defines the complaint as a written statement of "the essential facts constituting the offense charged". Rule 4(a) provides that a warrant shall issue only "if it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it".

An examination of the complaint herein [Deft. Ex. A; R. 19-20] reveals that the Rules of Criminal Procedure were completely ignored. There is not a single "essential fact" set forth therein upon which a finding of "probable cause" could be made. Not even the meagre facts which Heiner purportedly told to Ralston over the phone, as testified to in the trial, are set forth in the complaint. All that appears is the attempt to use the statutory language as a substitute for evidence. There is no fact to support the

conclusion of "knowledge", no fact to show "interstate transportation"; no fact to show a "purpose of sale and distribution"; and no fact to show "obscenity".

Moreover, it is clear from Ralston's testimony at the trial, and from other portions of the record [R. 6], that although the complaint was made upon the positive oath of agent Heiner, it is in reality a complaint based upon information and belief, and nothing more. A complaint made on information and belief, which does not give the grounds of the belief nor the sources of information, does not confer jurisdiction upon a United States Commissioner to issue a warrant of arrest, and an arrest, search and seizure made pursuant thereto cannot be sustained. (*Go-Bart Importing Co. v. United States*, 282 U. S. 344, 355; *Byars v. United States*, 273 U. S. 28; *United States ex rel. King v. Gokey*, 32 F. 2d 793 (D. C. N. Y., 1929).)

3. Without reliance upon an alleged lawful arrest, the search and wholesale seizure here (see *Kremen v. United States*, 353 U. S. 346) can find no support. As we have shown above, the officers who made the search and seizure had no probable cause for believing that the petitioners had committed, or were committing the offense charged. It follows that the search and seizure, in the absence of a search warrant, was invalid. (*Carroll v. United States*, 267 U. S. 132, 154; *United States v. Di Re*, 332 U. S. 581, 585; *Casey v. United States*, 343 U. S. 808; *Clay v. United States*, 239 F. 2d 196 (C. A. 5, 1956); *Carr v. United States*, 59 F. 2d 991 (C. A. 2, 1932).)

Moreover, the search and seizure were in any event invalid because the record demonstrates that there was time and that it was practical for the officers to obtain a search warrant. This was not a "fleeing vehicle" nor was

there any "hot pursuit". For two days the petitioners were followed, all their stops observed, and it was plain that they would ultimately return to Los Angeles. Even after their arrest, the car could have been guarded or stored while a search warrant was obtained. Clearly there was as much time to obtain a search warrant as there was to obtain the invalid warrant of arrest herein. Under the circumstances, petitioners' vehicle was as much entitled to protection as their home or business office. (*McDonald v. United States,* 335 U. S. 451; *Clay v. United States,* 239 F. 2d 196, 204 (C. A. 5, 1956); *Rent v. United States,* 209 F. 2d 893 (C. A. 5, 1954); *Hobson v. United States,* 226 F. 2d 890 (C. A. 8, 1955).)

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD MOSK,

Attorney for Petitioners.

SAM ROSENWEIN,

Of Counsel.

APPENDIX "A."

Opinion Below.

United States Court of Appeals for the Ninth Circuit.

Moe Weise and James Lester French, Appellants, vs. United States of America, Appellee. No. 15,502. Feb. 5, 1958.

Appeal from the United States District Court for the Western District of Washington, Southern Division.

BEFORE: HEALY, POPE, and LEMMON, Circuit Judges

HEALY, Circuit Judge

Appellants were convicted of the offense of transporting obscene material interstate (from Portland, Oregon, to Tacoma, Washington) in violation of 18 USCA §1465. On the appeal they contend only that the trial court erred in admitting the obscene material in that it had been illegally seized in violation of the Fourth Amendment to the Constitution.

Following is in summary the train of events leading up to the arrest and seizure. Appellant Weise was known to the agents of the Federal Bureau of Investigation as a dealer in pornographic material and of having a record of convictions as such. On March 15, 1956, he was under agency surveillance at Los Angeles. On that date he and appellant French left Los Angeles in the former's car, which was observed to be heavily loaded. FBI agents followed them to San Francisco where Weise told an agency informer that he had pornographic material for sale. While in San Francisco appellants were observed making calls at novelty shops which were known to deal in obscene material. At each call packages were removed from the car and delivered to the shop or store. Agents

in Oakland and Sacramento observed similar activities of appellants in those cities.

Appellants then drove to Portland, where they were again placed under surveillance by the FBI and were observed as before taking packages into stores known to deal in obscenity. On the night of March 17 appellants left Portland and traveled to Tacoma, being constantly under surveillance. Meanwhile Agent Heiner in Seattle, who had been kept advised of the activities through normal agency channels, filed a complaint charging violation of the relevant statute, the charge being lodged with United States Commissioner Burns in Seattle, who issued a warrant of arrest thereon. Simultaneously Agent Ralston in Tacoma was briefed on the above facts in a 45-minute phone conversation with the Seattle agent. Ralston undertook surveillance of appellants' car as it passed through Olympia and followed it to Tacoma. He personally observed that the car in question was heavily loaded and contained cardboard boxes piled on the back seat. In Tacoma appellants were stopped and placed under arrest. The boxes were seized incident to the arrest and were found to contain some 60,000 photographs and various other pornographic material.

The seizures were made without a search warrant. However, as indicated above, they were incident to the arrest of appellants, and if the arrests were lawful, the seizures were lawful. Marrion v. United States, 275 U. S. 192; Sugarman v. United States (9 Cir.), 35 F. 2d 663, at 665. But appellants argue that the arrests were illegal because, they say, there was no sufficient ground either for the issuance of the warrant of arrest or for an arrest without a warrant. They insist that the activities and knowledge of the FBI were insufficient to create

probable cause to believe that an offense was being committed. The contention is predicated on the proposition that the arrest is illegal unless the arresting officer himself has probable knowledge that an offense is being committed.

The cases cited for this proposition are United States v. Tureaud (1884), Circuit for the District of Louisiana, 20 Fed. 621; and Grau v. United States, 287 U. S. 124. The Tureaud case, in addition to being old, involved, not a warrant for arrest, but a sworn information—a proceeding no longer in use. In light of the later cases it is wholly without validity. The Grau case is not in point. It involved a search warrant which was held not to state certain vital facts required by the National Prohibition statute, providing that "no search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor." The affidavit for the warrant in question showed only a possible manufacture of spirits. By way of dicta the Court observed, at p. 128, "A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury [citations]; and would lead a man of prudence and caution to believe that the offense has been committed."

In Brinegar v. United States, 338 U. S. 160, a rum-running case not markedly different from the present on its facts, the Supreme Court observed at p. 175 of its opinion that "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved."

And, at p. 174, note 13, the Court referred to the dictum in Grau v. United States, *supra*, which we have quoted above, and went on to say that "for this proposition there was no authority in the decisions of this Court."

See further the holding of the Third Circuit in the Analogous case of United States v. Bianco, 189 F. 2d 716. Consult, also, United States v. Li Fat Tong, 2 Cir., 152 F. 2d 650, 652.

Affirmed.

(Endorsed:) Opinion. Filed Feb. 5, 1958.

Paul P. O'Brien, Clerk.

APPENDIX "B."

Judgment.

United States Court of Appeals for the Ninth Circuit.

Moe Weise and James Lester French, Appellants, vs. United States of America, Appellee. No. 15,502.

Appeal from the United States District Court for the Western District of Washington, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and entered: February 5, 1958

PAUL P. O'BRIEN, Clerk.

APPENDIX "C."

Constitutional Provisions and Statutes Involved.

CONSTITUTION OF THE UNITED STATES
FOURTH AMENDMENT

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

FIFTH AMENDMENT

"No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

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18 U. S. C. 1465

"Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

"The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five

such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

"When any person is convicted of a violation of this Act, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of such items described herein which were found in the possession or under the immediate control of such person at the time of his arrest. Added June 28, 1955, c. 190, §3, 69 Stat. 183."

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18 U. S. C. 3052

"The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony. As amended Jan. 10, 1951, c. 1221, §1, 64 Stat. 1239.

RULE 3, FEDERAL RULES OF CRIMINAL PROCEDURE

"The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States."

RULE 4(a), FEDERAL RULES OF CRIMINAL PROCEDURE

"If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue."